In the

United States Court of Appeals

For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant*
v.
E. L. FRANCE, *Trustee, et al., Appellees*
No. 16008.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, STATE OF WASHINGTON

JOHN J. O'CONNELL,
Attorney General,

H. T. HARTINGER,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellee, State of Washington.

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

In the

United States

Court of Appeals

For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant*
v.
E. L. FRANCE, *Trustee, et al., Appellees*
} No. 16008.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, STATE OF WASHINGTON

JOHN J. O'CONNELL,
Attorney General,

H. T. HARTINGER,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellee, State of Washington.

Temple of Justice, Olympia, Washington.

INDEX

TABLE OF CASES

TABLE OF CASES—Continued

TEXTBOKS

STATUTES

STATUTES—Continued

COURT RULES

CONSTITUTIONS

TREATIES

In the

United States
Court of Appeals

For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant*
v.
E. L. FRANCE, *Trustee, et al., Appellees*
} No. 16008.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, STATE OF WASHINGTON

STATEMENT OF PLEADINGS AND FACTS

Appellant, plaintiff below, an Indian tribe incorporated under the provisions of an act of Congress (48 Stat. 984, 25 U.S.C. 476) brought this action in its own right (appellant's brief, p. 6).

The complaint was filed December 3, 1948, and a pretrial order was entered (R. 80-116), October 1, 1956.

Thereafter, on July 31, 1957, appellant filed a motion for an order requiring the United States to be made an additional party plaintiff, and that its complaint be amended to show that the United States held title in fee to the lands involved, and that the prayer of its complaint be amended to ask that the title of the United States to such lands be quieted, and the same held by the United States in trust for plaintiff (R. 125).

The attorney general of the United States objected to the joinder by written memorandum (R. 126).

The trial court denied the motion and dismissed the action without prejudice (R. 133).

By Article I of the treaty of 1855 (12 Stat. 933), a portion of which is printed as an appendix to appellant's brief beginning on page 45, the Skokomish Indian Tribe, with other tribes, ceded to the United States all right, title and interest of the said tribes and bands to any land in the Territory of Washington.

By Article II of said treaty, there was reserved for the present use and occupation of the tribes and bands of Indians six sections of land at the head of Hood's Canal "to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use." (Appellant's brief, p. 47.)

The same article gave the president authority to place any other friendly tribe or band of Indians on the reservation and to allow them to occupy the same in common with the Indians signing the treaty.

Article VII of the treaty (not printed in the appendix to appellant's brief) gave the president the right to remove the Indians from land so reserved to other suitable places.

In accordance with the provisions of the treaty, the president of the United States, by executive order signed February 25, 1874 (Kappler's Indian Affairs, Volume I, p. 924) (R. 81), set apart for the use of the S'Klallam Indians a definite tract of land on Hood's Canal (including the six sections mentioned in the treaty), specifically describing and bounding the land as follows:

> "Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33, and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, *the same being the southwest corner of A. D. Fisher's claim*; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26, and 27; *thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.*" (Emphasis supplied.)

The underlining of the executive order is for the purpose of calling the attention of the court to the fact that the land set apart for the use of the S'Klallam Indians was specifically limited to a corner of a

donation claim, which corner was necessarily the line of ordinary high water, and that the tidelands were not set apart for the use of the Indians as they were in other executive orders. (See Quinaielt, Swinomish and Tulalip Reserves, Kappler, Vol. I, pp. 923, 925, all of which specifically set apart tidelands down to the low water mark.)

Appellant in this action seeks to quiet title in the United States to the tidelands below the line of ordinary high tide and above the line of low tide, notwithstanding the fact that these tidelands were not specifically set apart for the use of any tribe of Indians.

QUESTIONS INVOLVED

The questions involved are:

Does the court have jurisdiction of this cause of action, and, if so, does the court have jurisdiction against the sovereign State of Washington which is being sued in this action?

Jurisdiction is claimed:

(1) Under 28 U.S.C. 1331 on the ground that the interpretation of a treaty is involved; and

(2) under 28 U.S.C. 1345 in that the proceeding is one commenced by an agency or officer of the United States expressly authorized to sue by act of Congress.

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED, AND THEREFORE THE COURT DOES NOT HAVE JURISDICTION OF THIS CASE.

Since, under the executive order setting aside certain property for the use of Indians, the reservation was described as running to the corner of a donation claim and to Hood's Canal, it is no longer an open question but that the limit of the reservation is the line of ordinary high tide, and that tidelands do not form a portion of the reservation. There is, therefore, no substantial federal question involved and no jurisdiction.

The case of *U. S. v. Ashton*, 170 Fed. 509, is in point. Under the title of *George Bird, et al., Trustees, v. James M. Ashton, et al.*, 220 U. S. 604, the supreme court of the United States dismissed an appeal of this case for want of jurisdiction. In so doing the supreme court of the United States cited among others the case of *McGilvra v. Ross*, 215 U. S. 70, and *Shively v. Bowlby*, 152 U. S. 1, 58. See also *Mann v. Tacoma Land Company*, 153 U. S. 273, 284.

The mere fact that the action is brought by or in behalf of an Indian or Indian tribe does not confer jurisdiction on a federal court, and the mere fact that an Indian tribe's right of possession is guaranteed by a treaty with the United States does not confer original jurisdiction on a federal court. *Deere v. St. Lawrence River Power Co.*, 32 F. (2d) 550; *Teeters v. Henton*, 43 F. (2d) 175; *Phelps v. Hanson*, 163 F. (2d) 973; *In re Celestine*, 114 Fed. 551.

APPELLANT IS NOT AN AGENCY OR OFFICER OF THE UNITED STATES AND IS NOT EXPRESSLY AUTHORIZED TO SUE BY ACT OF CONGRESS.

Appellant is not a corporation in which the government has a proprietary interest and is, therefore, not an agency of the United States as defined in 28 U.S.C. 451, 62 Stat. 907.

The jurisdiction of federal courts in actions brought by a corporation on the ground that it was organized under an act of Congress is limited by act of Congress to cases where the United States is the owner of more than one-half of the corporate stock. 28 U.S.C. 1349; *Martinez v. Southern Ute Tribe*, 249 F. (2d) 915, 919.

No act of Congress expressly authorizing appellant to sue is cited in appellant's brief, and it is respectively submitted that none exists.

On the other hand, Congress has created the Indians Claims Commission with the authority and duty to hear and determine all claims against the United States made on behalf of any Indian tribe, specifically including claims arising under the constitution, laws, treaties of the United States, and executive orders of the president. 25 U.S.C. 70a; 28 U.S.C. 1505.

It is respectively submitted that this action does not involve the interpretation of a treaty so as to vest the court with jurisdiction, and that appellant is neither an agency nor an officer of the United

States, nor expressly authorized to sue by act of Congress, and that the dismissal of this action was correct.

IN ANY EVENT, THE COURT DOES NOT HAVE JURISDICTION OF THE SOVEREIGN STATE OF WASHINGTON WHICH HAS NOT CONSENTED TO BE SUED IN THIS ACTION.

Counsel for the State of Washington maintained their objection to the jurisdiction of this court on the ground that the state had not consented to be sued at all times in responsive pleadings and negotiations for a pretrial order.

The question is, however, so important that it would have been considered if raised for the first time on appeal. *Ford Co. v. Department of Treasury*, 323 U. S. 459, 467.

Because counsel for appellant admit that the State of Washington may not be sued without its consent (appellant's brief, p. 30), we will simply give one quotation from *Monaco v. Mississippi*, 292 U. S. 313, 329, which the State of Washington called to the attention of the trial court:

> "Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. *Hans v. Louisiana, supra* [134 U. S. 1]; *Smith v. Reeves, supra* [178 U. S. 436]; *Duhne v. New Jersey, supra* [251 U. S. 311, 314]; *Ex parte State of New York, No. 1, supra* [256 U. S. 490, 498]." (Citations supplied.)

The foregoing quotation appears in the record at page 64 as a part of the "STATEMENT OF DEFENDANT, STATE OF WASHINGTON AS TO ITS POSITION ON JURISDICTION." (R. 64-70.) This statement of the State of Washington was filed during consultations regarding the contents of a pretrial order when it appeared that appellant intended to assert title to tidelands belonging to the state.

A motion to dismiss for lack of jurisdiction had been filed by the State of Washington on April 27, 1951 (R. 42), prior to the settlement of any issues, and a memorandum brief in support of this motion was filed (R. 42-45).

THE STATE OF WASHINGTON HAS NOT WAIVED ITS IMMUNITY FROM SUIT, EXCEPT IN CERTAIN SPECIFIED COURTS OF THE STATE.

A state may consent to be sued only in its own courts, in which event suit may not be maintained in federal courts. A clear declaration of a state's intention to submit its affairs to other courts than those of its own creation is necessary before it will be deemed to have waived its immunity from suit. *Great Northern Ins. Co. v. Read*, 322 U. S. 47, 54.

The legislature of the State of Washington has specifically limited its waiver of immunity from suit, and under the authority of Article II, § 26, of the Washington State Constitution, has definitely designated "in what courts, suits may be brought against the state."

The only act of the legislature authorizing suits against the state is chapter 95, Laws of 1895 (p. 188), as amended by chapter 216, Laws of 1927, now codified as RCW 4.92.010.

The title to the act of 1895 is:

> "AN ACT authorizing actions against the state."

Section 1 thereof reads in part as follows:

> "Any person or corporation having any claim against the State of Washington shall have the right to begin an action against the state in the superior court of Thurston county. * * *"

Before the passage of this act the State of Washington could not be sued in any court. After the passage of this act the state could be sued in the superior court of Thurston County, Washington only.

The title to the amending act of 1927 (chapter 216, p. 331) reads as follows:

> "AN ACT relating to, and authorizing and governing, actions against the State of Washington, and amending Sections 1 and 2 of Chapter XCV of the Laws of 1895."

Section 1 of this act again provides that a person having a claim against the state shall have a right of action in the superior court of Thurston County, Washington, but provides that actions against the state affecting title to real property may be brought in the county where the property is situated.

After the amendment of 1927, all actions against the State of Washington must still be brought

in the superior court of Thurston County, Washington, unless they involve title to real property, in which event they may be brought in the superior court of that county in the State of Washington in which the real property is situated.

Contrary to the statement made by counsel for appellant on page 30 of their opening brief, the state courts designated are the exclusive forum in which a suit against the state may be brought.

The state cannot be sued without its consent and then only in the manner and to the extent provided by statute. *Pape v. Armstrong*, 47 Wn. (2nd) 480, 489, 287 P. (2d) 1018.

This statute waiving the state's immunity from suit in the superior court of Thurston County is one of jurisdiction, and the superior court of Thurston County may not grant a change of venue so that the action could be tried in another county of the state. *State ex rel. Thielicke v. Superior Court*, 9 Wn. (2d) 309, 114 P. (2d) 1001.

The statute waiving the state's immunity from suit in the superior court of Thurston County did not create a new liability, and hence the state may not be sued for tort in any county (*Riddoch v. State*, 68 Wash. 329, 123 Pac. 450), nor is it liable for interest (*Pape v. Armstrong, supra*), nor costs (*Washington Recorder Publishing Co. v. Ernst*, 1 Wn. (2d) 545, 97 P. (2d) 116).

Counsel for appellant argue that RCW 4.92.010

does not prohibit an action against the state in the federal court. (Appellant's brief, p. 32.)

This argument overlooks the sovereign state's immunity from suit in any court. The state has not waived its immunity from suit in the United States district court and may, therefore, not be sued therein.

In *Riddoch v. State*, 68 Wash. 329, 332, 123 Pac. 450, the supreme court of the State of Washington pointed out that RCW 4.92.010 does not waive any defense the state may have (quoting *Billings v. State*, 27 Wash. 288, 67 Pac. 583). Certainly it did not waive the defense of want of jurisdiction over the sovereign state.

A STATUTE DEFINING THE DUTY OF THE ATTORNEY GENERAL DOES NOT WAIVE THE STATE'S IMMUNITY FROM SUIT.

Counsel for appellant point to § 194, chapter 255, Laws of Washington for 1927 (now codified as RCW 79.01.704), making it the duty of the attorney general to institute or defend any action in which the interests of the state are involved, in the courts of any state or of the United States.

The argument seemingly advanced on page 31 of the appellant's brief is that this statute makes it mandatory for the attorney general to defend cases against the state, on the merits, in courts which lack jurisdiction.

This argument was considered and repulsed by the supreme court of the United States in *Ford Co.*

v. Department of Treasury, 323 U. S. 459, where the court said on page 468:

> " * * * Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases. Nor do we think that any of the general or special powers conferred by statute on the Indiana attorney general to appear and defend actions brought against the state or its officials can be deemed to confer on that officer power to consent to suit against the state in courts when the state has not consented to be sued. * * * "

In the early case of *Adams v. Bradley*, 1 Fed. Cas. 93 (Case No. 48), the court considered the authority of the attorney general to waive the state's immunity from suit under a statute making it the duty of the attorney general to represent the state in bringing suits and defending the same, and said (p. 96):

> " * * * The state cannot be made a party at all, without its consent, and the assumed appearance of the district attorney or attorney-general, without express authority of law, does not constitute a consent. I do not think the provision in the statute of Nevada, in regard to the duties of the attorney-general, touches the question. *It might be the duty of the attorney-general to appear and make the objection that the state cannot be sued*, and even to conduct the defense for the benefit of the state. But it is a general law, such as exists in most if not all the states defining the duties of the attorney-general, to appear and defend the interests of

> the state in those cases where the state may be rightfully sued. * * * However this may be, it is clear that this section of the statute does not in terms, or by any reasonable implication authorize private parties to sue the state; and we have seen from the authorities cited, that where there is no authority of law for suing the state, an assumed authority of an attorney of the state to appear does not confer jurisdiction over the state. * * *" (Emphasis supplied.)

Chapter 255, Laws of Washington for 1927, does not waive the state's immunity from suit nor authorize any state officer to do so. No such purpose is expressed in the title as required by Article II, § 19, of the Washington State Constitution.

Chapter 255, Laws of Washington for 1927, was passed at the same session of the legislature which amended the consent-to-suit statute (chapter 216, Laws of Washington for 1927).

Each act had its separate, specific purpose. Chapter 216 specifically authorizes suits against the state in certain state courts only. Chapter 255 deals with the management of state property and the duty of certain state officers in connection therewith.

THE ATTORNEY GENERAL COULD NOT WAIVE THE STATE'S IMMUNITY FROM SUIT.

The appearance of the attorney general in this action could not confer upon the court jurisdiction which it does not have.

In *Deseret Water, Oil & Irrigation Co. v. State of California* (CCA 9th Cir.), 202 Fed. 498, 500, the court said:

> "Again, the effect of the appearance in the case of the Attorney General on behalf of the state must be limited by the terms of the statute of the state whereby it consented to be sued. Section 1240 of the Code of Civil Procedure of California authorizes the condemnation of state lands to a public use when not devoted to other public uses; and section 1243 provides that 'all proceedings under this title must be brought in the superior courts of the counties in which the property is situated.' This is a consent to be sued only in a court of the state, and in that respect the case is similar to that which was before this court in Smith v. Rackliffe, 87 Fed. 964, 31 C. C. A. 328, affirmed in Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, in which it was held that it was competent for the state to couple with its consent to be sued the condition that the suit be brought in one of its own courts."

In *Title Guaranty & Surety Co. v. Guernsey*, 205 Fed. 91, 94, a case in the United States district court for the western district of Washington, it was held that the state's immunity from suit could not be waived by the attorney general. In this case the objection to jurisdiction was raised after the state had filed an answer and cross-bill. The court said in its second opinion appearing in 205 Fed. at page 95:

> "It would have, perhaps, been more seemly had the Attorney General challenged the jurisdiction of the court at the threshold; but the immunity of the state from suit can only be waived by the Legislature, and it is in no manner bound or estopped by the acts of its officers.* * *"

The holdings of the supreme court of the State of Washington are to the same effect. The appearance of the attorney general cannot confer jurisdiction. *MacVeigh v. Division of Unemployment Compensation*, 19 Wn. (2d) 383, 388, 142 P. (2d) 900.

THE ATTORNEY GENERAL CHALLENGED THE COURT'S JURISDICTION OF THIS ACTION AS AGAINST THE STATE OF WASHINGTON AT ALL TIMES.

The record will show that the only relief asked by the state in this case was and is that the action as against it be dismissed on the ground that the state had not consented to be sued, and that the court lacked jurisdiction.

On the 9th day of May, 1949, the State of Washington filed and served upon counsel for plaintiff its notice of appearance and request that all further pleadings be served upon said defendant at the office of the attorney general, Olympia, Washington (R. 38).

No relief was asked for.

It was not necessary that this notice of appearance be specifically denominated as a special appearance. Rule of Civil Procedure 12(b), (28 U. S. C. A. Rule 12)

In the case of *Orange Theatre Corp. v. Rayherstz* (CCA 3rd Cir.), 139 F. (2d) 871, 874, the court said:

> "It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appear-

ances. A defendant need no longer appear specially to attack the court's jurisdiction over him. * * *"

The court cited *Blank v. Bitker* (7 Cir. 1943), 135 F. (2d) 962, 966, to the same effect.

The state's first responsive pleading was a motion to dismiss on the ground that the court was without jurisdiction over the sovereign state (R. 42). A brief supporting this motion was also filed on the same day (R. 42-45).

On February 20, 1954, a second motion to dismiss was filed on the ground that the court lacked jurisdiction, the state not having consented to be sued or waived its immunity from suit (R. 60).

The trial court ordered a pretrial conference for the 17th day of May, 1954, and specifically provided (R. 63):

> "Ordered that upon the pretrial conference on the 17th day of May, 1954, the defendant, State of Washington, may renew its motion to dismiss the above entitled action as to such defendant on the ground that this Court has no jurisdiction in this action over the State of Washington."

On March 16, 1955, the State of Washington filed the following statement of its position on jurisdiction (R. 64):

> "Counsel for the State of Washington are advised that the pretrial order now being prepared will show that plaintiff intends to assert title to tidelands belonging to the sovereign State of Washington and, therefore, feel it their

> duty to suggest to the court in the words of the Rule of Civil Procedure 12 (h) that since the sovereign State of Washington has consented to be sued only in the superior court of that county of the State of Washington in which the property is situated (RCW 4.92.010) this court, if it has jurisdiction as against defendants other than the State of Washington, has no jurisdiction as to the sovereign State of Washington."

This statement was followed by a brief citing cases on which the state relied (R. 64-70).

On July 23, 1956, counsel for all defendants, except the State of Washington, made a motion to dismiss for want of prosecution (R. 72).

A brief was filed in support of this motion (R. 75-79). In this brief the following statement was made with respect to the position of the State of Washington (R. 75-76):

> "The State of Washington does not join herein because the State has made a continuing objection as to the jurisdiction of the above-entitled Court over the State of Washington in this action."

A pretrial order was filed on October 1, 1956 (R. 80-116). This pretrial order, approved by all counsel including counsel for appellant, contains the following statement of fact (R. 115):

> "Defendant State of Washington, at all times continuing its objection to any jurisdiction of this court over the sovereign State of Washington, by participating in the entry of this pretrial order, conferences therefor, or in approving this order, does not thereby consent

to such jurisdiction nor join in any contentions expressed by any of the defendants for affirmative relief, such as for the designation of a commission of land surveyors or any other relief whatsoever."

The contention of the State of Washington appears as Paragraph 25 of the defendants' contentions (R. 93) and is as follows:

"The court is without jurisdiction of the sovereign State of Washington, it not having consented to be sued in this court nor waived its immunity from suit."

The issue of law as claimed by the State of Washington is stated as follows (R. 100):

"1. Does the court have jurisdiction in this action of the State of Washington?"

Appellant did not contend in this pretrial order that the state had waived its immunity from suit (R. 82) nor make that argument an issue to be presented to the court (R. 99).

Following the entry of the pretrial order, the court considered the question of jurisdiction before considering the merits and granted the only motion which the state had made, namely, for dismissal for want of jurisdiction.

ARGUMENT IN ANSWER TO APPELLANT'S ARGUMENT

Appellant now argues "that the State of Washington has consented to this action against it in the manner of its appearance and handling of this lawsuit." (Appellant's brief, p. 30.)

Apparently to support this argument appellant quoted from *People v. Detroit, G. H. & M. Ry. Co.*, 157 Mich. 144, 121 N. W. 814, 819. This was a case in which the State of Michigan, acting through its attorney general, appealed to the supreme court of the United States from a ruling of the lower federal court. The attorney general of Michigan invoked the jurisdiction of the federal court and asked that court to rule on the merits.

He then sought to disregard the ruling of the federal court and bring the same cause of action in the state courts. The supreme court of Michigan pointed out that the state, having appealed to the supreme court of the United States, was the moving party in the federal court action and rightfully held that the judgment in the federal court was res judicata.

In *O'Connor v. Slaker*, 22 F. (2d) 147, the court of appeals for the eighth circuit considered an objection to the jurisdiction of the court over the State of Nebraska which was raised for the first time on appeal, holding that if the trial court was without jurisdiction, it could not decide the case as to the state even with the consent of the parties.

In the case at bar, objection to the jurisdiction was made before any action was taken in the case and was preserved throughout.

Counsel for appellant suggest (appellant's brief, p. 32) that the state is "involved in its proprietary rather than its governmental interest" in the case at bar. The state has not waived its immunity from suit in the federal court in any capacity.

However, we cannot admit that the state in holding title to tidelands which it does by virtue of its inherent sovereignty is acting in a proprietary capacity.

The supreme court of the United States considered the nature of the state's title to tidelands in the case of *Shively v. Bowlby*, 152 U. S. 1, and referring to them, said (p. 43):

> "* * * It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. * * *"

In holding that the United States held title to tidelands in trust for the future states, the court further said (p. 49):

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under

them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the inprovements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

Counsel for appellant have cited two Washington cases on page 32 of their brief: *Pape v. Armstrong*, 47 Wn. (2d) 480, 287 P. (2d) 1018 (1955), and *Columbia Steel Co. v. State*, 34 Wn. (2d) 700, 209 P. (2d) 482 (1949).

These cases are simply authority for the proposition that the state cannot be sued without its consent and then only in the manner and to the extent provided by statute and is, therefore, not liable for interest since the statute waiving the state's immunity from suit in the superior court of Thurston County, Washington, did not provide for interest.

On page 33 of appellant's brief, counsel quote from 49 Am. Jur., States, Territories, and Depen-

dencies, § 97, pp. 313, 314, to the effect that a state's appearance in a court is a voluntary submission to its jurisdiction.

The truth of this general statement depends upon, of course, the nature of the appearance, and the appearance referred to by the text writer is an appearance in the nature of an intervention as will be seen from the cases cited in the footnote supporting this statement.

The first case cited by the text writer is *Missouri v. Fiske*, 290 U. S. 18. In that case the State of Missouri moved to intervene in a federal court proceeding asking only that certain stock should not be distributed until the right thereto could be determined in a state court proceeding. The court held that this was too limited an intervention to constitute a waiver of the state's immunity from suit (p. 25), and held that the trial court did not have jurisdiction over the state, even to protect its own decree, where the state had not waived its immunity from suit. In this case the court also pointed out that the nature of the suit has nothing to do with the jurisdiction of federal courts over nonconsenting states. On page 28 of the decision we find the following language:

> "The fact that a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will

> receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit. * * * [citing cases]"

In the second of the cases cited by the text writer, *Clark v. Barnard*, 108 U. S. 436, the State of Rhode Island intervened asking for affirmative relief. The supreme court, after pointing out that federal courts are always open to states as suitors or plaintiffs, said (p. 448):

> "* * * In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of *Georgia v. Jesup*, 106 U. S. 458, where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. * * *"

In the case at bar the State of Washington appeared only to protest against the exercise of jurisdiction, and there could be therefore no waiver of immunity.

49 Am. Jur. 314, States, Territories, and Dependencies, § 96, from which counsel for appellant

quote, contains the following statement regarding the authority of the attorney general:

> "* * * Unless duly authorized by law, the general rule is that the attorney general cannot waive the state's immunity from suit and bind it by appearing in actions so as to give the court jurisdiction. * * *"

It goes without saying that had the attorney general failed to object, the court would not have acquired jurisdiction as a result of such failure.

In the case of *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 691, 151 Pac. 108, the supreme court of the State of Washington said:

> "* * * Here the suit is against the sovereign state, which can only be sued in a particular place, in a particular manner, and (in cases such as the case in question) by a specially designated person. Clearly no officer of the state has power, by mere failure to object, to permit the state to be sued in any other or different manner, or by any other or different person than it has itself permitted. We think, therefore, that the court in which the action is pending not only has the power to call in question, but owes to itself and to the state the duty of calling in question, the right of the plaintiff to maintain the action."

On page 33 of their brief counsel have called the court's attention to 42 A. L. R. 1464 and 50 A. L. R. 1408. We have carefully read these annotations and find nothing therein which would support any of the arguments made by counsel for appellant in this case.

In 42 A. L. R. 1478 we find the following statement by the annotator:

> "Where the consent indicates a state court, the Federal court has no jurisdiction. *Smith v. Reeves* (1900) 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; *Chandler v. Dix* (1904) 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766; *Deseret Water, Oil & Irrig. Co. v. State* (1913) 120 C. C. A. 641, 202 Fed. 498; *Title Guaranty & S. Co. v. Guernsey* (1913; D. C.) 205 Fed. 94."

The federal and state cases supporting the proposition that the attorney general may not waive the state's immunity from suit, unless duly authorized by law so to do, will be found collected in 42 A. L. R. 1484.

Lastly, counsel for appellant refer to the merits and justice of appellant's suit, saying on page 37 of their brief:

> " * * * It would be a travesty of justice if the State, having entered a solemn compact to respect the rights of Indians to their lands, were to be permitted to nullify this guaranty by assserting a claim of immunity from suit. * * * "

The compact referred to is a compact with the United States contained in Article XXVI, § 2, of the Washington State Constitution which disclaims the right of the state to unappropriated public lands owned or held by any Indian or Indian tribe.

The United States Department of the Interior has just published for the year 1958 its treatise entitled "Federal Indian Law" in which we find the following statement on page 307:

> "Congress already has given its consent to

all States to assume jurisdiction with respect to criminal offenses or civil causes of action.[6]

---

[6]See sec. 7 of the act of August 15, 1953, 67 Stat. 588, 28 U. S. C. 1360 note."

Appellant's claim in this case is to tidelands, and the term "public lands" does not include tidelands. *Mann v. Tacoma Land Company*, 153 U. S. 273, 284.

The State of Washington specifically asserted its ownership to tidelands in Article XVII, § 1, of its constitution.

The State of Washington has waived its immunity from suit in the proper state court, and a remedy by appeal is available. *Missouri v. Fiske*, 290 U. S. 18, 29.

Appellee, United States, points out in its brief that the sovereign immunity from suit is the same whether Indians or other parties are involved (p. 5) and cites cases sustaining the proposition that "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." (P. 4.)

We agree.

United States v. Minnesota, 270 U. S. 181, involved circumstances which made it proper for the United States to bring suit on behalf of tribal Indians. Objection was made to the United States bringing the action, and it was argued that the Indians could neither sue the State of Minnesota nor

the United States. The court defined the sovereign immunity from suit in these words (p. 195):

> "* * * The reason the Indians could not bring the suits suggested lies in the general immunity of the State and the United States from suit in the absence of consent. Of course the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States, a sister State, or a foreign State. *United States v. Texas*, 143 U. S. 621, 642, *et seq.* Otherwise her immunity is like that of the United States. * * *"

Counsel for appellant have cited a number of cases which do not touch the question of jurisdiction or of the state's immunity from suit. None of these cases supports counsel's argument that jurisdiction depends upon which court, state or federal, an Indian might have chosen (appellant's brief, p. 35). The sovereign immunity from suit is absolute and unqualified.

State v. Satiacum, 50 Wn. (2d) 513, 314 P. (2d) 400 (1957) (see addendum, Hill, C. J. on p. 538), cited by counsel for appellant, decided nothing except that criminal charges against an Indian were properly dismissed. The Indian's rights were considered in state courts. The right of appeal exists. There is no support for the inference made by counsel for appellant on pages 36 and 37 of their brief that the Indian is without remedy or that the state claims absolute immunity from suit.

U. S. v. O'Brien, 170 Fed. 508, is cited on page 35 of appellant's brief. This case, together with the

case of *Corrigan v. Brown*, 169 Fed. 477, were explained by Judge Hanford (who wrote the opinions in these cases) in *U. S. v. Ashton*, 170 Fed. 509, on pages 519 and 520, in which the court pointed out that where, as in the case at bar, the Indian reservation runs to a body of water, its limits are the line of ordinary high tide.

Counsel for appellant argue that the United States District Court is the sole forum in which the title to tidelands lying within the state of Washington may be tried. (Br. p. 38.)

This argument is not well founded. The rule is stated in 42 Am. Jur., Public Lands, section 70, page 846, as follows:

> "It is the rule that the courts of a state must determine the validity of titles to land lying in the state, although such titles emanated from the Federal Government or the controversy involves construction of Federal statutes, and they can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source. In all such cases an appeal may be taken to the Supreme Court of the United States, but no branch of the Federal judiciary has been invested with original jurisdiction in such cases."

On page 38 of appellant's brief there is a quotation from 12 A. L. R. (2d) 29 to the effect that the asserted or alleged federal question must be real and substantial to vest a federal court with original jurisdiction. With this we agree; however, this case does not arise out of a treaty. The test is the nature of the right plaintiff claims, not the source of the

authority to establish it. (See 12 A. L. R. (2d), Anno., p. 41).

In any event, the federal court has no original jurisdiction in an action against the state, even if the cause of action might be said to arise under the constitution laws or treaties. See 12 A. L. R. (2d) Anno., p. 69.

CONCLUSION

Counsel for appellees other than the State of Washington and the United States will file a separate, joint brief. While the state is in agreement with the position of these appellees and believes the judgment of the trial court to be correct in every particular, we deem it proper to confine ourselves to the question of jurisdiction against the sovereign state and respectfully submit that the action of the trial court in dismissing the case as against the sovereign state for want of consent to be sued is correct and should be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

H. T. HARTINGER,
Assistant Attorney General,

E. P. DONNELLY,
Assistant Attorney General,

Attorneys for Appellee,
State of Washington.